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In the Supreme Court of the United States

OCTOBER TERM, 1969

UNITED STATES OF AMERICA, PETITIONER

v.

SHELDON G. PERLMAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Solicitor General,
WILL WILSON,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The court of appeals rendered no opinion in reversing the judgment of conviction.

JURISDICTION

The judgment of the court of appeals (Appendix A, *infra*) was entered on September 23, 1969. On October 21, 1969, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including November 21, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

369-395—69

QUESTION PRESENTED

Whether the assertion of the privilege against self-incrimination provides a complete defense to a charge of transferring marihuana not pursuant to a written order form, in violation of 26 U.S.C. 4742(a).

STATUTES AND REGULATIONS INVOLVED

26 U.S.C. 4742(a) provides:

> It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate.

Other pertinent statutes and regulations are set forth in the Brief for the United States in *Buie* v. *United States*, No. 271, this Term.

STATEMENT

Respondent and Harold J. Dalton were charged in a one-count indictment in the United States District Court for the Northern District of Illinois with transferring a quantity of marihuana not in pursuance of a written order form, in violation of 26 U.S.C. 4742 (a). Following a nonjury trial, respondent was convicted and sentenced to five years' imprisonment.[1]

The evidence showed that in early December 1965, narcotics agent Robert F. Bottorff, acting in an undercover capacity, met Dalton in a tavern in Chicago.

[1] Co-defendant Dalton entered a plea of guilty, and on June 20, 1966, was sentenced to five years' imprisonment. Thereafter, he was deported to Ireland (Tr. 298–299).

Dalton mentioned the possibility of assisting Bottorff in obtaining narcotics from a friend in Morocco, whom he called "Shelley" (Tr. 19–20). When Bottorff expressed interest, Dalton composed a message in language which he said "Shelley" would understand. Bottorff cabled the message to respondent Sheldon Perlman in Tangiers, Morocco (Tr. 20–21). Subsequently, Dalton wrote another letter which he gave to Bottorff with instructions to send it to respondent together with $20 as a "show of faith" (Tr. 25). On December 14, the agent enclosed a $20 money order in the letter and sent it to respondent in an addressed envelope furnished by Dalton (Tr. 25). On the same day Bottorff received a letter from respondent indicating that he could supply hashish (Tr. 30–31). A small quantity of hashish encased in a metal foil inserted in a Christmas card was received from respondent on December 31 (Tr. 83). A few days later Bottorff met with Dalton and expressed satisfaction with the quality of the hashish (Tr. 89). For the next two months, the agent and Dalton corresponded regularly with respondent to arrange for a future delivery; all letters were addressed to "Sheldon Perlman" or "Shelley Perlman", in care of American Express, Tangiers, Morocco (Tr. 126). In one letter Bottorff, acting on Dalton's instructions, sent respondent a $100 money order to be used to offset expenses incurred by respondent in acquiring the hashish and corresponding with Dalton and Bottorff (Tr. 95).

On March 15, 1966, Dalton telephoned Bottorff to inform him that a French-language magazine in which hashish had been secreted had been received from re-

spondent (Tr. 112–113). Later that day Bottorff gave Dalton $100, and received the magazine. In some of the inner pages of the magazine a rectangle approximately three by five inches had been cut out, and a metal foil, containing more than 24 grams of hashish, inserted (Tr. 114, 242). No written order forms had ever been sent to respondent by Bottorff as required by the Marihuana Tax Act (Tr. 121). Respondent was arrested on July 25, 1967, at O'Hare International Airport (Tr. 153).[2]

While the case was pending on appeal to the Seventh Circuit, respondent filed a "Motion for Per Curiam Judgment of Reversal" (Appendix B, *infra*), contending that his conviction under 26 U.S.C. 4742(a) violated his privilege against self-incrimination; he relied on several decisions of that court sustaining self-incrimination challenges to convictions under 26 U.S.C. 4742(a) on the authority of *Leary* v. *United States*, 395 U.S. 6, and *United States* v. *Covington*, 395 U.S. 57. On September 23, 1969, the court of appeals, without argument or brief from the

[2] To establish that respondent was the party in Morocco engaged in the marihuana transaction, the government adduced evidence at trial showing that he had been out of the United States at the time the transaction occurred. In addition, a handwriting expert compared respondent's signature and other writing on passport documents with the handwriting on the letters received by agent Bottorff and concluded that they had been written by the same individual (Tr. 180–252).

government, entered an order reversing the judgment of conviction "in view of this Court's holdings in the cases cited in defendant-appellant's motion for judgment of reversal" (Appendix A, *infra*).

REASONS FOR GRANTING THE WRIT

The question presented by this case is identical to the question before this Court in *Buie* v. *United States*, No. 271, this Term, which was argued in the October Session and is now pending decision.

Unlike the statutory provisions involved in *Leary* and *Covington, supra*, compliance with Section 4742 (a) does not require a transferor of marihuana himself to disclose any information at all: the statute merely forbids him from making a transfer unless the transferee produces an order form which he has obtained from the Secretary of the Treasury. As we argue fully in our brief in *Buie*, on which we rely here, the fact that the *transferee* must disclose the name and address of the prospective transferor in order to secure an order form does not impose any obligation of *self*-incrimination on the transferor. Nothing in the statute requires the transferor to supply that information, and—as demonstrated by the facts of the present case, in which the agent learned respondent's name and address from an intermediary—there is no basis for any assumption that such information can be obtained only from the transferor.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted and judgment should be entered in accordance with this Court's disposition in *Buie* v. *United States, supra.*

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys.

NOVEMBER 1969.

APPENDIXES

APPENDIX A

United States Court of Appeals for the Seventh Circuit, Chicago, Illinois

Tuesday, September 23, 1969

Before

Hon. ROGER J. KILEY, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. OTTO KERNER, *Circuit Judge*

No. 17543

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

SHELDON G. PERLMAN, DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

On consideration of the motion of defendant-appellant for the entry of a judgment to reverse defendant-appellant's judgment of conviction.

IT IS ORDERED AND ADJUDGED by this Court that the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, be and the same is hereby reversed, in view of this Court's holdings in the cases cited in defendant-appellant's motion for judgment of reversal.

APPENDIX B

In the United States Court of Appeals for the Seventh Circuit

No. 17543

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

SHELDON G. PERLMAN, DEFENDANT-APPELLANT

DEFENDANT-APPELLANT'S MOTION FOR PER CURIAM JUDGMENT OF REVERSAL

Now comes SHELDON G. PERLMAN by MAURICE J. WALSH and CARL M. WALSH, his attorneys, and moves this Court to enter its Per Curiam Judgment reversing the defendant-appellant's judgment of conviction.

In support of this motion, it is stated:

1. The Government has filed a motion to extend time in which it may file its brief and appendix in which it states that the defendant-appellant has been convicted of a violation of 26 U.S.C. 4742(a).

2. In that same motion, the Government also concedes that the United States Supreme Court has held in *Leary* v. *United States,* 395 U.S. 6, that a portion of 26 U.S.C. 4744(a)(2) is unconstitutional in violation of the Fifth Amendment. The Government further notes that this Court has held in *Santos* v. *United States,* —— F. 2d —— (No. 16985, August 19, 1969, 7 Cir.) that 26 U.S.C. 4742(a) (the statute for which the defendant-appellant has been convicted of violating) is also unconstitutional in violation of the Fifth Amendment privilege against self-incrimination.

3. This Court has also, in its Per Curiam decision in *Ward* v. *United States*, —— F. 2d —— (No. 16955, August 19, 1969, 7 Cir.) and its opinion in *United States* v. *Reynolds*, —— F. 2d —— (No. 16921, September 2, 1969, 7 Cir.) held that 26 U.S.C. 4742(a) is violative of the Fifth Amendment privilege against self-incrimination, and that a conviction based upon a violation of that statute cannot stand. This Court, in those decisions, relied upon and cited the Supreme Court's decisions in *Leary* v. *United States*, 395 U.S. 6; *United States* v. *Covington*, 395 U.S. 57, *Marchetti* v. *United States*, 390 U.S. 39, *Grosso* v. *United States*, 390 U.S. 62; and *Haynes* v. *United States*, 390 U.S. 85.

Six Judges of this Court have thus concurred in the conclusion that 26 U.S.C. 4742(a) is unconstitutional.

4. Although this Court concluded in *Santos* v. *United States* that "Defendants should not be required to anticipate favorable Supreme Court rulings or compelled to make the futile gesture of raising the privilege at trial to preserve their rights in the event of * * * [a favorable forthcoming] decision." (No. 16985, slip opinion, p. 7), it should be noted that this defendant-appellant moved prior to trial, during trial, and post-trial, to dismiss his one-count indictment charging him with violating 26 U.S.C. 4742(a) as being barred by the Fifth Amendment.

Further, the denial of these motions is the first assignment of error appearing in the defendant-appellant's brief (pp. 1, 13).

It is thus suggested that since six Judges of this Court have now concurred in the conclusion that 26 U.S.C. 4742(a) is unconstitutional, and that the Government has conceded that the defendant-appellant

was convicted of violating that statute only, that no purpose is served in delaying decision of this appeal.

WHEREFORE, the Defendant-Appellant prays that this Court enter a Per Curiam Judgment reversing his judgment of conviction.

By SHELDON G. PERLMAN,
Defendant-Appellant,
CARL M. WALSH,
One of His Attorneys.